

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

October 14, 2009

David A. Boswell, Esquire
Schmittinger & Rodriguez,
4602 Highway One, Second Floor
Rehoboth Beach, DE 19971

Stephen P. Casarino Shalk, Esquire
Casarino Christman Shalk Ransom & Doss, P.S.
405 North King Street, Suite 300
Renaissance Centre
P.O. Box 1276
Wilmington, DE 19899

RE: *Tracy C. Jones, et al. v. Ronald Lee Peek*
C.A. No. 02C-03-024-RFS

Dear Counsel:

As you know, the case at bar is one of long duration, far too long in fact. The Complaint was filed in March 2002 and, despite Plaintiffs' efforts to move the case forward, Defendant took no action until June 2009, more than seven years later.¹ At that time,

¹In the meantime, I granted a default judgment against Defendant and held an inquisition hearing to determine the amount of Plaintiffs' damages. In November 2004, I awarded Plaintiffs a total of \$234,000, plus interest against Defendant.

Defendant shifted into gear and filed three motions: a Motion to Vacate Default Judgment, an Emergency Motion to Stay, and a Motion to Dismiss for Lack of Personal Jurisdiction. During a teleconference, I requested that the parties file supplemental briefing on the issue of waiver of personal jurisdiction because of Defendant's lengthy inaction. The outcome of the waiver issue would affect the resolution of the motion to dismiss and the motion to vacate. I stayed the execution of the judgment pending the outcome of the motion to dismiss. As explained below, I find that Defendant has acted at his peril in failing to respond to the suit brought against him. He has waived his right to raise the issue of lack of *in personam jurisdiction*, and the judgment against him will stand. I thereby deny the motion to open the default judgment, deny the motion to dismiss and lift the stay on the default judgment.

Contentions. Defendant's argument as to waiver of personal jurisdiction is limited to an assertion that a defendant may defer asserting a defense of personal jurisdiction almost indefinitely and that his own delay may not operate as a waiver. Defendant bases this assertion on a brief passage from *Baldwin v. Iowa State Traveling Men's Ass'n*,² which was issued prior to the adoption of the federal rules and are the pattern for our own. *Baldwin's* holding pertains to the issue of *res judicata* in a subsequent suit with the same parties where the respondent raised the defense of lack of personal jurisdiction in the first suit. It is not helpful in deciding the case at bar.

²283 U.S. 522, 525 (1931)(holding that judgment in former case overruling motion to dismiss for want of jurisdiction over person of defendant was *res judicata* of subsequent suit against same defendant).

Plaintiffs argue that Defendant concedes the facts constituting waiver by conduct, that is, inaction.³ Plaintiffs offer numerous state and federal cases showing that the defense of personal jurisdiction can be waived in several different ways, most importantly for this case, those where the defendant delayed responding to an action taken against him.⁴

Standard of review. Rule 60(b) provides that the Court may relieve a party from a final judgment for mistake, inadvertence, surprise or excusable neglect or any other reason justifying relief from the operation of the judgment.⁵

Discussion. Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.⁶ It can be waived by failure to assert it seasonably, by formal submission, by submission through conduct or by agreement

³The due process clause of the Fourteenth Amendment requires that service of process be reasonable calculated both to apprise party of pendency of an action and to provide it with the opportunity to respond. Defendant Peek's signature on the return mail card shows that he was apprised of the lawsuit and he had plentiful opportunities to respond. He took advantage of none of them. Plaintiffs made discovery requests, which, like everything else, were ignored. Plaintiffs assert that discovery would have born out their position that the minimum contacts requirements were met. *Hart Holding Co. Inc. v. Drexel Burnham Lambert inc.*, 593 A.2d 535 (Del. Ch. 1991)(noting that plaintiff not be precluded from attempting to prove that a defendant is subject to the jurisdiction of the court, and may not ordinarily be precluded from reasonable discovery in aid of mounting such proof).

⁴*See, e.g., Bavouset v. Shaw's of San Francisco*, 43 F.R.D. 296 (S.D. Tx. 1967) (denying defendant's motion to dismiss for lack of personal jurisdiction, which was not filed until after default judgment was entered).

⁵*Nashold v. Giles & Ransome, Inc.*, 245 A.2d 175 (Del. 1968).

⁶*Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982).

among the parties.⁷ Plaintiffs are correct that Defendant failed to raise the defense seasonably, and this, if anything, is understatement. Neither party has put forth a case where a defendant delayed as long as this one, nor has the Court found one.

However, guidance is found close to home. In *Plummer v. Sherman*,⁸ the Delaware Supreme Court faced facts similar though less extreme than those at bar. The Court rested its decision on Rule 12, as well as certain federal cases. In *Plummer* the appellee did not raise the defense of lack of personal jurisdiction in her answer, nor in her motion to dismiss. She raised it at argument on the motion to dismiss, which was, as the Court noted with disapproval, 71 days after the filing of the Complaint.

The Court held that in order to avoid waiving the defense of lack of personal jurisdiction, the appellee would have had to amend her answer to assert the defense within 20 days after the answer was served. In analyzing the issue, the *Plummer* Court observed first that Rule 12 is designed to prevent a party from using a series of motions as a dilatory tactic.⁹ This Court notes that Rule 12 is also a means of directing a party to take timely action on answers or motions.

⁷*Burton v. Northern Dutchess Hospital*, 106 F.R.D. 477 (S.D.N.Y.1985)(citing *Neirbo Co. v. Bethlehem Corp.*, 308 U.S. 165, 168 (1939)).

⁸861 A.2d 1238 (2004).

⁹*Id.* at 1243.

Plummer went on to discuss the relation of Rule 12(b)¹⁰ to Rule (h) ¹¹ concluding that when the two subsections are read *in pari materia*, they require that a Rule 12 defense of lack of personal jurisdiction defense must be raised by a timely Rule 12 motion or, if no motion is filed, in the first responsive pleading. If not, the defense is waived.¹² Rule 12(h) requires that an amendment to the answer be made as permitted by Rule 15(a), that is, 20 days after it is served. In this case, Defendant did not file an answer, much less a motion to dismiss or an amended answer. In fact, as the parties well know, Defendant did not assert this defense until June 2009, more than seven years after the complaint was filed in March 2002. Lack of personal jurisdiction may be waived by the conduct of a party,¹³ and this is just such a case. Federal case law supports this result.

¹⁰Rule 12(b) states in part:

How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) Lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19.

¹¹Rule 12(h)(1) states:

Waiver or preservation of certain defenses.(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this Rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

¹²*Id.* at 1244-45.

¹³*Lomanco, Inc. v. Missouri Pacific Railroad Co.*, 566 F.Supp. 846 (E.D. Ark. 1983).

For example, as one court has stated, “[n]owhere do the federal rules contemplate that a party may simply ignore pleadings it receives.”¹⁴ Again, “[a]s a matter of policy, it would seem that a defendant should have a duty, if he has actual notice of a lawsuit, to appear and raise his objections.”¹⁵ Recognition of that duty is inherent in the doctrine of waiver by implication. This doctrine applies where the defendant has been improperly served with process, yet has actual notice of the lawsuit, and thereafter a default judgment is entered against him.¹⁶

The case at bar is even more egregious because Defendant was properly served, as shown by the registered mail receipt he signed, and yet he took no action. A court may infer by a defendant’s inaction that he has waived his personal defenses of jurisdiction over the person, venue, process or service. The entry of a default judgment, such as took place in this case, occurs only after time and energy are expended to achieve the judgment.¹⁷ The Seventh Circuit Court of Appeals found no abuse of discretion where the district court entered a default after the defendant failed to appear, answer or respond to the complaint after being served 17 months earlier.¹⁸

¹⁴*Billy v. Ashland Oil Inc.*, 102 F.R.D. 396 (E.D. Pa. 1977).

¹⁵*U.S. ex rel Combustion Systems Sales, Inc. v. Eastern Metal Products and Fabricators, Inc.*, 112 F.R.D. 685 (M.D.N.C. 1986).

¹⁶*Id.* at 687.

¹⁷*Id.*

¹⁸*O’Brien v. R.J. O’Brien & Assoc., Inc.*, 998 F.2d 1394 (7th Cir. 1993).

Closer to home, the Third Circuit has stated:

Rule 12(h) imposes a **higher sanction with respect to the failure to raise the specific defenses of lack of personal jurisdiction**, improper venue, insufficiency of process, and insufficiency of service of process. If a party filed a pre-answer motion but fails to raise one of the defenses enumerated above, the party waives the omitted defense and cannot subsequently raise it in his answer or otherwise.¹⁹ (Emphasis added.)

In this case, Defendant delayed far beyond the time for motions, far beyond even the entry of the default judgment against him. Another court has called this behavior not waiver but forfeiture, distinguishing waiver as an intentional relinquishment of a known right, while forfeiture is the failure to make a timely assertion of a right before a court competent to make such a determination.²⁰ The Eleventh Circuit has stated without hesitation that lack of personal jurisdiction and improper venue, unlike lack of subject matter jurisdiction, are waivable defenses.²¹

The United States Supreme Court has held that a lower court properly took jurisdictional facts as established where the defendants repeatedly failed to comply with discovery orders to provide the requested materials.²² In its discussion of the ramifications of failing to follow the federal rules, the Court stated that, for example, “the failure to enter

¹⁹*Myers v. American Dental Assoc., V.I.*, 695 F.2d 716, 720 (3rd Cir. 1983) (citing 2 A. J. Lucas & J. Moore, *Moore’s Federal Practice*, ¶ 12.23).

²⁰*Swaim v. Moltan Co.*, 73 F.3d 711 (7th Cir. 1996).

²¹*Lipofsky v. New York State Workers’ Compensation Bd.*, 861 F.2d 1257, 1258 (11th Cir. 1988).

²²*Ins. Co. of Ireland, Ltd. v. Compagnie des Baurites de Guinee*, 456 U.S. 694, 706 (1982).

a timely objection to personal jurisdiction constitutes, under Rule 12(h)(1), a waiver of the objection.”²³ While this is *dicta* rather than direct authority, I find it to be helpful, especially in light of our Supreme Court’s holding in *Plummer v. Sherman*.

Conclusion. Having carefully reviewed the entire record in this matter, I conclude that Defendant waived his right to assert the defense of personal jurisdiction. The Stay of Execution is ***Lifted*** as of the date of the issuance of this Order, the Motion to Dismiss the Complaint is ***Denied*** and the Motion to Vacate the Default Judgment is ***Denied***.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

RFS/cv

cc: Prothonotary

²³*Id.* at 705.